IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9171 OF 2005

1. Commissioner of Customs having his office at CSI Airport, Sahar Andheri, Mumbai 400 009.

2. Addl. Commissioner of Customs, having his office at CSI Airport, Mumbai.

3. Assistant Commissioner of Customs Air Intelligence Unit, having his office at CSI Airport,Mumbai ..Petitioners.

V/s.

1. Manish Kalvadia, an Indian Inhabitant residing at 303, Prashant Complex, Sahth Lal Society, Hira Baug, Varachha Road, Surat - 6.

2. Mahesh V. Savani, an Indian Inhabitant, Parnter of M/s.I.P. Patel & Co. having his office at 1907, Panchratna Building, Opera House, Mumbai.

3. M/s.I.P.Patel & Co., a Partner-ship firm registered under the Indian Partnership Act, having its office at 1907, Panchratna building, Opera House, Mumbai.

4. Bharat K.Bodra of Mumbai, India Inhabitant residing at 301, Borivali Shopping Centre, Chandawarkar, Borivali (W), Mumbai

5. Girish K. Bodra, an Indian Inhabitant, residing at 37, Diamond Bazar, Varachha Road, Surat-6.

		)
6.	Settlement Commission,	)
	Customs and Central Excise,	)
	Mumbai, having its office at	)
	Utpad Shulk Bhavan, 6th Floor,	)
	Bandra-Kurla Complex, Bandra(E),	)
	Mumbai - 400 051.	)..Respondent.

Mr.P.S.Jetly, Advocate with H.V.Mehta for the Petitioners.

Mr.S.N.Kantawala, Advocate for the Respondents.

WITH

WRIT PETITION NO.8622 OF 2005

Manish Kalvadia, an Indian	)
Inhabitant residing at 303,	)
Prashant Complex, Sahth Lal	)
Society, Hira Baug, Varachha	)
Road, Surat - 6.	)..Petitioners.

V/s.

1.	Union of India, Central Govt.	)
	2nd Floor, Ayakar Bhavan, M.K.	)
	Road, Mumbai - 400 020.	)
		)
2.	The Commissioner of Customs,	)
	CSI Airport, Sahara, Mumbai.	)
		)
3.	The Jt.Commissioner of Customs	)
	Air Intelligence Unit, CSI	)
	Airport, Mumbai	)
		)
4.	The Settlement Commission of	)
	Customs and Central Excise,	)
	Through the Administrative	)
	Officer Utpad Shulk Bhavan,	)
	6th Floor, Bandra-Kurla Complex,	)
	Bandra (E), Mumbai - 400 051.	)..Respondents.

Mr.V.S.Kantawala, Advocate for the Petitioner.

Mr.P.S.Jetly, Advocate for the Respondents.

CORAM : H.L.GOKALE AND
J.P.DEVADHAR, JJ.

DATED : 20TH DECEMBER, 2006.

ORAL JUDGMENT (PER J.P.DEVADHAR, J.)

1. Heard. Rule, returnable forthwith. By consent of the parties, both the petitions are taken up for final hearing.

2. Both these petitions arise from the order passed by the Settlement Commission on 9th November, 2005 under section 127C(1) of the Customs Act, 1962 (‘the Customs Act’ for short) and hence both these petitions are heard together and disposed of by this common Judgment.

3. Writ Petition No.9171 of 2005 is filed by the revenue to challenge the order passed by the Settlement Commission dated 9th November, 2005; whereas Writ Petition No.8622 of 2005 is filed by Shri Manish Kalvadiya seeking enforcement of the order of the Settlement Commission dated 9/11/2005.

4. The facts relevant for the disposal of these

two petitions are that by a show cause notice dated 17th October, 2003 the Joint Commissioner of Customs Air Intelligence Unit, Mumbai directed Manish Kalvadiya, Bharat Bodra, Girish Bodra, Mahesh Savani and M/s.I.P.Patel and Co. to show cause as to why 5877 carats of cut and polished diamonds valued at Rs.2,79,61,710/- seized from Manish Kalvadiya and 34147.66 carats of cut and polished diamonds valued at Rs.36,44,66,620.25 seized from the office premises of M/s.I.P.Patel & Co. should not be confiscated under the provisions of section 111 of the Customs Act and to show cause as to why penalty should not be imposed upon them under section 112 of the Customs Act.

5. Before the said show cause notice dated 17th October, 2003 was adjudicated upon, all the noticees under the said show cause notice filed applications before the Settlement Commission under section 127 B of the Customs Act.

6. The Settlement Commission, following the decision of the Madras High Court of the **Commissioner of Customs V/s. Customs and Central Excise Settlement Commissioner** reported in **2002 (139) E.L.T. 512 (Mad)** by its order dated 16/8/2004 dismissed the said applications as not maintainable. The said order of

the Settlement Commission dated 16th August, 2004 was challenged by Manish Kalvadia by filing Writ Petition No.2430 of 2004 and this Court on 21/7/2005 allowed the Writ Petition and set aside the order of the Settlement Commission dated 16/8/2004. As a result, the Settlement Commission was entitled to entertain the applications in question.

7. Accordingly, all the five applications were heard and by the impugned order dated 9th November, 2005, the Settlement Commission admitted the application filed by Manish Kalvadiya under section 127C(1) of the Customs Act and directed that 5877 carats of the cut and polished diamonds seized from Manish Kalvadiya be released on his depositing the admitted duty liability of Rs.83,11,742/- and also executing a bond covering the value of the goods with bank guarantee for Rs.25,00,000/-. The Settlement Commission further held that the above order passed in the case of Manish Kalvadiya will apply to the case of M/s.I.P.Patel & Co. because the show cause notice was a composite one and that the reliefs granted to Manish Kalvadiya will apply to M/s.I.P.Patel & Co. as a co-noticee. This order of the Settlement Commission is challenged by the Revenue.

8. Mr.Jetly, learned counsel appearing on behalf of the revenue in Writ Petition No.9171 of 2005 submitted twofold arguments. Firstly, he submitted that in the absence of filing of bill of entry as contemplated under the proviso to section 127C(1) of the Customs Act, the Settlement Commission has no jurisdiction to entertain the application filed by Manish Kalvadiya. Secondly, he submitted that when M/s.I.P.Patel & Co. had filed a separate application in respect of 34147.66 carats of cut and polished diamond, the Commission could not have held the reliefs granted to Manish Kalavadiya in respect of 5877 carats of cut and polished diamonds will apply to M/s. I.P.Patel & Co. as a co-noticee.

9. The first argument of Mr.Jetly that in the absence of filing of bill of entry, the application filed by Manish Kalavadiya was not maintainable is wholly misconceived, because, in the present case, initially the very same argument was advanced by the revenue before the Settlement Commission and the Settlement Commission vide its order dated 16th August, 2004 had accepted the said argument and dismissed the applications as not maintainable. However, on a Writ Petition bearing No.2430 of 2004 filed by Manish Kalvadiya, this Court by its Judgment and order dated

21st July, 2005 set aside the order of the Settlement Commission dated 16th August, 2004 and held that the application was maintainable. It is the case of the Revenue that the Special Leave Petition filed against the decision of this Court dated 21st July, 2005 is pending before the Apex Court. Therefore, when this Court has already ruled that the application filed by Manish Kalvadiya is maintainable, it is not open to the revenue to contend that the Settlement Commission was in error in entertaining the application filed by Manish Kalvadiya. Accordingly, the first argument of Mr.Jetly is liable to be rejected.

10. As regards the second argument of Mr.Jetly, on perusal of the show cause notice, it is seen that there were two issues (one) relating to confiscation of 5877 carats of cut and polished diamonds seized from Manish Kalvadiya and (two) confiscation of 34147.66 carats of cut and polished diamond seized from the office premises of M/s.I.P.Patel & Co. Admittedly, said Manish Kalvadiya and M/s.I.P.Patel have filed independent applications before the Settlement Commission. It is pertinent to note that in the application filed by M/s.I.P.Patel & Co., relating to 34147.66 carats of cut and polished diamond no additional amount of duty has been disclosed and they

have referred to the amount of Rs.8,53,829/- offered by Manish Kalvadiya in respect of 5877 carats of cut and polished diamonds. By the impugned order, the Settlement Commission has held that in view of composite show cause notice issued, the reliefs granted to Manish Kalvadiya in respect of 5877 carats of cut and polished diamond will be applicable to M/s. I.P.Patel and Co. as a co-noticee in respect of 34147.66 carats of cut and polished diamond.

11. This Court in the case of **Yogesh Korani V/s. Union of India** reported in **2003 (159) E.L.T. 3 (Bom.)** has held that where the liability of the main noticee and co-noticee arises under two independent causes of action and the main noticee settles the dispute under the cause of action relating to him only, but does not settle the cause of action relating to the co-noticee, then the co-noticee cannot get immunity in respect of the cause of notice which is not settled.

12. Mr.Kantawala, learned counsel appearing for the respondents fairly states that in view of the aforesaid decision of this Court, the finding recorded of the Settlement Commission cannot be sustained. However, Mr.Kantawala submitted that the impugned order dated 9th November, 2005 may be treated to be

restricted to the case of Manish Kalvadiya alone, In our opinion, when the order passed by the Settlement Commission is a composite order, it will not be proper to hold that it is restricted to Manish Kalvadiya alone. Moreover, even in the case of Manish Kalvadiya, the Settlement Commission has not given any finding as to whether the enhanced duty liability accepted by Manish Kalvadiya represents the correct duty liability. In this view of the matter in our opinion, it is just and proper to set aside the impugned order and remit the matter back to the Settlement Commission with a direction to decide it afresh in accordance with law, leaving all the contentions of both the sides open.

13. Accordingly, the impugned order dated 9th November, 2005 is quashed and set aside and the matter is remitted back to the Settlement Commission to decide the applications filed by the parties independently and in accordance with law. All contentions of all the parties are kept open.

14. Rule is made absolute in the above terms in Writ Petition No.9171 of 2005 and in view of the above order Writ Petition No.8622 of 2005 is dismissed as not pressed.

15. Both the petitions are disposed of accordingly with no order as to costs.

(H.L.GOKHALE, J.)

(J.P.DEVADHAR, J.)